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In the
Supreme Court of the United States

October Term, 1927

No. 852 96

THE STATE HIGHWAY COMMISSION OF WYOMING, CONSISTING OF HYRAM LINGLE, T. D. O'NEIL, S. W. CONWELL, J. M. SNYDER and ROY SENEY,

Petitioner,

vs.

UTAH CONSTRUCTION COMPANY, a Corporation,

Respondent.

PETITION FOR CERTIORARI

BRIEF ACCOMPANYING PETITION

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WYOMING LABOR JOURNAL, CHEYENNE

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THE STATE HIGHWAY COMMISSION OF WYOMING, CONSISTING OF HYRAM LINGLE, T. D. O'NEIL, S. W. CONWELL, J. M. SNYDER and ROY SENEY,

Petitioner,

vs.

UTAH CONSTRUCTION COMPANY, a Corporation,

Respondent.

Petition for Writ of Certiorari.

To the Honorable The Supreme Court of the United States:

The petition of The State Highway Commission of Wyoming respectfully shows:

1. That on May 13th, 1925, the Utah Construction Company filed in the United States District Court for the District of Wyoming its petition against The State Highway Commission of Wyoming, your petitioner, in which said petition it sought to recover from your petitioner the sum of $544,827.74, which sum it alleged to be due upon two causes of action. In its first cause of action it sought to recover

$456,053.93 as damages for an alleged breach of a certain contract for the building of a portion of the Wind River Canyon State Highway; and in its second cause of action it sought to recover $88,773.81, which sum it alleged to be due and unpaid on estimates furnished by the State Highway Engineer for work done and performed under said contract. (Record—Pages 4-74.)

2. In said action the jurisdiction of the Federal Court was based upon an alleged diversity of citizenship, concerning which the petition contained the following allegations:

> "That the said Hyram Lingle, G. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney are respectively the duly appointed, qualified and acting Highway Commissioners of the State of Wyoming, and that collectively the said persons above named constitute the State Highway Commission of Wyoming with power to sue and be sued under the provision of the statute of Wyoming in such case made and provided. That the said persons constituting the said State Highway Commission of Wyoming, and the said Commission is each a resident and citizen of the State of Wyoming."
>
> (Record—Page 4)

3. Your petitioner first by demurrer and afterward by answer challenged the jurisdiction of the District Court on the ground that the suit was in reality a suit against the State of Wyoming by a citizen and resident of the State of Utah, and that therefore, under the Federal Constitution and Statutes, the Federal Courts were without jurisdiction. The District Court on final hearing sustained this contention, held that it was without jurisdiction because the suit was in reality a suit against the State of Wyoming, and

thereupon entered an order dismissing plaintiff's petition. The decision of the District Court is reported in 16 Fed. (2nd) at Page 322, and appears here at Page 110 of the Record.

4. In due time the respondent appealed the case to the Circuit Court of Appeals of the Eighth Circuit, which, in an opinion by a divided court, reversed the decision of the District Court and held that the action was against The State Highway Commission of Wyoming and not against the State of Wyoming itself, and that the Federal Courts had jurisdiction. (Record—Page 121.)

Statement of Facts.

And your petitioner respectfully shows that the facts upon which it bases its claim that this action is an action against the State of Wyoming and therefore is not within the jurisdiction of the Federal Courts, are as follows:

1. That prior to the year 1916 the State of Wyoming was not authorized to engage in any work of internal improvements unless the proposition to make such improvement was first submitted to and authorized by a two-thirds vote of the people. In that year its Constitution was amended so as to permit the State to engage in the work of constructing public roads and highways.

2. That in the year 1919 the Legislature of the State of Wyoming, for the purpose of putting into effect said constitutional amendment, passed an Act known as the State Highway Act, now Sections 3025 to 3037 of the Wyoming Compiled Statutes, 1920. This Act provides (1) for a "State Highway Department to consist of a State Highway Commission and a State Highway Superintendent";

(2) that the "State Highway Commission shall consist of five State Highway Commissioners, who shall be appointed by the Governor with the advice and consent of the Senate"; (3) that the "Commission shall have the power to sue in the name of the State Highway Commission of Wyoming, and may be sued by such name in any court upon any contract executed by it"; (4) that the Attorney General shall be the legal adviser of said Commission; (5) that the Commission shall maintain offices in the State Capitol Building in charge of the State Highway Superintendent; (6) *that there shall be created a "State Highway Fund", in the possession and under the control of the State Treasurer, who shall place to its credit all moneys paid to the State of Wyoming by the United States to assist in the building of public highways, all moneys received from the sale of State bonds for highway construction or improvement, all moneys derived from State taxes levied for highway purposes,* etc.; (7) *that the moneys in said State Highway Fund shall not be paid out except by warrants issued by the State Auditor on vouchers approved by the State Highway Superintendent;* (8) *that the title to the lands over which any State Highway may be built,* including the road-bed and right-of-way, *shall vest in the State of Wyoming;* and (9) that *the construction and maintenance of all State Highways,* including bridges and culverts thereon, *shall be performed at the expense of the State* and by and under the supervision of the Commission and the State Highway Superintendent. The Act also appropriated a certain sum out of the general funds in the State Treasury for such highway work, and additional sums have been appropriated by each succeeding Legislature. In 1927 the Legislature changed the provisions of (3) supra so that it now provides that the Commission may be sued in the Courts of the State of Wyoming and in no other jurisdiction.

It will thus be seen that the Legislature has specifically provided that the construction of all State Highways is to be paid for out of a State Highway Fund, consisting of moneys raised by State taxes and the sale of State bonds or appropriations made by the Legislature out of the general fund, and that the expense of construction of all such highways shall be paid by the State of Wyoming; and that the State Highway Commission in awarding contracts for the building of State Highways and in supervising their construction, acts merely as an alter ego of the State,—a body which the State has created and designated to do that particular portion of the work of the State. (True and correct copies of said constitutional amendment and of said State Highway Act are annexed to and made a part of petitioner's brief filed herewith, and the same are hereby referred to for further particulars.)

3. While these Statutes were in full force and effect the State Highway Department, in the spring of 1922, determined to construct a State Highway through the Wind River Canyon in Fremont and Hot Springs Counties, Wyoming. Said Highway was to be built in co-operation with the United States Government, and is designated in the advertisement for bids and in the contract sued on in this action as the "Wind River Canyon Road State Highway",—"Federal Aid Project No. 118". Bids were called for, and the respondent, Utah Construction Company, being the lowest bidder for the construction of Sections B, C and D of said State Highway, its bid was accepted. (Record—Pages 61-68)

4. Thereafter, on June 1st, 1922, a contract was entered into with the respondent for the doing of said construction work. (Record—Pages 68-72) The first paragraph of said contract is most significant and reads as follows:

> "This Agreement, made and entered into this 1st day of June, 1922, between the State of Wyoming, acting through the State Highway Commission, and Utah Construction Company, a corporation, of Ogden, in the State of Utah, hereinafter called the contractor."

In said contract it was further provided that the road to be built was a portion of the Wind River Canyon Road State Highway; that the work was to be done to the satisfaction of the State Highway Engineer; that when the work of building said road had been completed the State of Wyoming should pay, and the contractor should receive, as full compensation for everything furnished and done under the contract the unit prices stipulated in the proposal; and that in the event of a breach of the contract by the contractor, it should pay to the State of Wyoming a certain amount as liquidated damages. The contract also contains many other provisions showing that the State of Wyoming is a party thereto. The testimonium clause is as follows:

> "In Witness Whereof, *The State of Wyoming,* acting through its State Highway Commission, *party of the first part,* has caused these presents to be executed by its Superintendent and the seal thereof to be hereunto affixed, on the day and year first above written; and the said party of the second part, has caused these presents to be executed and has hereunto affixed his hand and seal the 3rd day of June, A. D. 1922."
>
> (Record—Page 71)

5. It was further provided in said contract that the advertisement for bids, proposals, plans, specifications, etc. should be considered as a part of said contract, and these latter also contain many provisions showing that the State of Wyoming is the real party in interest and the party that was building said road. (Record—Pages 14, 25, 63, 65, 68 etc.)

6. After the above contract had been duly executed by the parties thereto, the respondent, Utah Construction Company, began the work of building said State Highway, and in due time completed the same. In December, 1922, a supplemental agreement was entered into. (Record—Page 72) This supplemental agreement is very short, and provides for certain changes in grades and alignments, and for the doing of a large amount of additional excavation, tunnel work, etc. at the unit prices mentioned in the original contract. It also provides for the extension of time within which to complete the work. *But said supplemental agreement does not in any way change, alter or modify any of the provisions of the original contract referred to in the preceding paragraphs of this petition.*

7. During the progress of the work the Utah Construction Company, in accordance with the provisions of the Statute hereinbefore referred to, filed each month its sworn vouchers for work done, which were approved by the State Highway Superintendent. Warrants were drawn by the State Auditor for the amount of these vouchers, and these warrants were paid by the State Treasurer out of moneys in the State Highway Fund. When the road was finally completed it presented a claim for extra work, which the State Highway Superintendent refused to pay, and thereupon it filed suit upon the contract as above stated.

Contentions of Your Petitioner.

It was the contention of your petitioner in the lower courts, and it is its contention in this Court, that although your petitioner is named as the party defendant in said action, the State of Wyoming is the real party to this controversy, and that the provisions of the contract hereinabove referred to, which is made a part of plaintiff's petition, when read in connection with the law creating the State Highway Department, demonstrate conclusively that the State of Wyoming and not the State Highway Commission is the real party to the above contract and the only party that can be sued thereon; that the State Highway Commission is merely an arm or agency of the State of Wyoming, having supervision of the letting of the contracts for State Highways, and that any action upon said contract was and is an action against the State of Wyoming.

Reasons Why a Writ of Certiorari Should be Granted.

Your petitioner is advised and so believes, that under the facts and the law of this case the findings and judgment of the Circuit Court of Appeals of the Eighth Circuit, reversing the judgment of the District Court and holding that this suit is not a suit against the State of Wyoming, are erroneous and are in violation of the rules, decisions and principles of law as laid down by this Honorable Court, and that this Honorable Court should require said case to be certified to it for its review and determination under and in accordance with the provisions of the Acts of Congress in such cases made and provided, for the following reasons:

(1) Because the findings and judgment of said Circuit Court of Appeals of the Eighth Circuit are in direct conflict with the holdings and decisions of this Honorable Court in the cases of Hagood vs. Southern, 117 U. S. 52; Ex parte Ayers, 123 U. S. 443; Smith vs. Reeves, 178 U. S. 436; Murray vs. Distilling Company, 213 U. S. 151, and other cases cited in petitioner's brief filed herewith, each and all of which said cases hold that the Court must look through form to substance in an action brought against state officers or state agencies to determine whether or not the State is the real party defendant, even where the State is not actually named as a party to the record, and that if upon investigation it appears that the action is in reality an action against a sovereign state, then the Federal Courts are without jurisdiction, save and except in those special cases where federal questions are involved.

(2) Because the findings and decision of the Circuit Court of Appeals of the Eighth Circuit in the case at bar were and are in direct conflict with the decisions of this Honorable Court in the cases of Hodgson vs. Dexter, 1 Cranch 345; Belknap vs. Schild, 161 U. S. 10, and other cases cited in accompanying brief, each and all of which hold that where a public agent acts in the line of his duty and under legal authority, he is not individually responsible on any contracts that he may make in that capacity.

(3) Because said Circuit Court of Appeals in its decision refused to give any force or effect to the amendment to the State Highway Act passed by the Wyoming State Legislature in 1927, and such action and the decision of said Circuit Court of Appeals are in direct conflict with the decisions of this Honorable Court in Beers vs. Arkansas, 50 How. 527; In re Ayers, 123 U. S. 443, and other cases referred to in the accompanying brief.

(4) Because the decision of the Circuit Court of Appeals purports to be based upon certain decisions of this Honorable Court, which said decisions are not applicable to the facts of this case, as is pointed out in the dissenting opinion of Judge Scott.

(5) Because the decision of said Circuit Court of Appeals decides an important question of local law, a question in which the State of Wyoming is vitally interested, in a way that is in direct conflict with the decisions of the Wyoming Supreme Court in Hjorth Royalty Company vs. Trustees of University, 30 Wyo. 309, and Franzen vs. Southern Surety Company, 35 Wyo. 15. In the former case the Wyoming Supreme Court holds that, "a suit against a department of the State Government or a board or corporation created by the State for governmental purposes, is a suit against the State", and in the latter case it holds that the State Highway Commission is one of the departments of the State itself and that its contracts are the contracts of the State of Wyoming.

(6) Because the decision of the Circiut Court of Appeals reversing the United States District Court for the District of Wyoming was by a divided court, Scott, District Judge, writing a strong dissenting opinion in favor of affirming said judgment; that as the matter now stands one United States Circuit Judge and one United States District Judge have held that the action in the case at bar is not an action against the State of Wyoming, but against the State Highway Commission of Wyoming, and therefore the federal courts have jurisdiction; while on the other hand two United States District Judges have held that the action is an action against the State of Wyoming, and therefore the federal courts were and are without jurisdiction.

(7) Because the majority opinion of said Circuit Court of Appeals is self contradictory, as appears upon the face of said opinion.

(8) Because the decision of said Circuit Court of Appeals would require the United States District Court for the District of Wyoming to take jurisdiction of a case and to try an action against a nominal defendant which said Court in its opinion concedes "has no property, no power of taxation, no means of discharging a judgment should one be recovered against it". (Record—Page 131) Lex nil facit frustra. Lex neminen cogit ad vana seu inutilia.

(9) In addition to the above grounds your petitioner would also respectfully call the attention of this Honorable Court to the fact that plaintiff's petition does not state a cause of action against petitioner; that the acts therein complained of are not the acts and doings of your petitioner or any of its authorized agents, nor does the plaintiff in its prayer for relief ask for any judgment against your petitioner.

Your petitioner appends hereto its brief in support of this petition, in which each and all of the foregoing matters are more fully set forth and discussed.

Your petitioner believes that in no way can it more clearly show the errors and rulings here complained of than by setting forth the majority and minority opinions of the Circuit Court of Appeals, and as both are very short, omitting the introductory part, they are here set forth in full, and are as follows:

"Lewis, Circuit Judge, after stating the facts as above, delivered the opinion of the Court.

"The learned district judge in finally sustaining the demurrer expressed his reasons in a written opinion. Following the rule announced on the subject in Ex parte State of

New York, 256 U. S. 490, and other cases, the conclusion was reached that the suit was in reality against the State; and that being so, the jurisdiction alleged, diverse citizenship, did not exist,—because the State is not a citizen. Postal Tele. Cable Co. vs. Alabama, 155 U. S. 482; Minnesota vs. Northern Securities, 194 U. S. 48; Hertz vs. Knudson, 6 F. (2d) 812; and Chicago R. I. & P. Ry. Co. vs. State of Nebraska, 251 Fed. 279. Furthermore, it was thought that even if the statute authorizing suits against the State Highway Commission should be taken as a waiver of the State's immunity granted by the Eleventh Amendment, still that would not confer jurisdiction where it appeared from the complaint the court was without jurisdiction. Obviously, both conclusions rest on the premise that the suit against the commission is a suit against the State.

"Primarily the commission could not be sued at law unless it be a party to the contract. Barring equitable innovations, with which we are not now concerned, Anson on Contracts, 2nd Am. Ed., page 459, says:

> '* * * the rule is best expressed in the words of Parke, B., in Beckham vs. Drake, 9 M. & W. 95, 'those only can sue or be sued upon an indenture who are named or described in it as parties.'

"Looking only to the contract of June 1, 1922, it would be difficult to say that the commission was a party to it and liable to suit for its breach. Apparently it signed the contract in its own right and behalf, but the obligation to pay for the work was expressly imposed on the State, and the State, not the commission, was named as a party to it. But for the supplemental agreement we would be constrained to say the commission could not be sued. But we observe in the later agreement the parties here declared over their signatures that the agreement of June first was a contract be-

tween the State Highway Commission of Wyoming and the Utah Construction Company. That statement is rather borne out by excerpts from the specifications and is in harmony with the statute itself which authorizes the commission to make such contracts. The statute made it a legal entity for that purpose, imposed on it the duty of initiating the improvement, to supervise its construction and to make settlements with the contractor.

"We are not impressed with the soundness of the contention that the suit is in reality one against the State. Plaintiff seeks no relief against it, nor interference with its property, rights or functions. The commission is the sole defendant, it has no property, no power of taxation, no means of discharging a judgment should one be recovered against it. In that event it will be entirely optional with the State as to what, if anything, it will do in the premises. It will not be legally bound. But if the court has jurisdiction the controversy between the parties to the contract will be finally adjudicated, and that seems to be the limit of our present inquiry. Port of Seattle vs. Oregon & W. R. R., 255 U. S. 56, 71.

"The complaint distinctly alleges that each member of the commission is a resident and citizen of the State of Wyoming. We think there can be no doubt the commission is suable as such and that the Federal court had jurisdiction because of diverse citizenship. Seemingly the identical inquiry was answered in Thomas vs. Board of Trustees, 195 U. S. 207, 218; '* * * as the Board was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the Circuit Court would have sufficiently appeared, so far as the pleadings were concerned, without bringing the several persons constituting the Board before the court as defendants, provided the bill had contained

the additional allegation that each individual Trustee was a citizen of Ohio.' It hardly need be said that the members of the commission would not be personally liable, had they been made parties; because their acts were official, and not of a personal character. Hodgson vs. Dexter, 1 Cranch 345, 363; Belknap vs. Schild, 161 U. S. 10, 17; Astoria Marine Iron Works vs. United States Shipping Board Emergency Fleet Corporation, 295 Fed. 415, 417.

"The demurrer did not challenge the second cause of action on the ground that it did not state sufficient facts; and the trial court expressed no opinion in its written memorandum on that issue as to the first cause of action. We see no cause to doubt the sufficiency of the second count as a pleading, and, as said, it was not challenged; as to the first count we leave that for the present to the court below.

"Reversed with directions to set aside the order dismissing the complaint.

"Filed December 21, 1927.

"Scott, District Judge, dissenting:

"I regret that I am unable to concur with the majority of the Court in its opinion sustaining the jurisdiction of the District Court. I am constrained to the conclusion that the State Highway Commission of Wyoming is not a corporation. The act of the Wyoming legislature creating the Board does not purport to create a corporation, but in my opinion a mere Commission to which is committed the execution of particularly described duties. It is designed to hold no title to property. It can have no financial interests of any character, and neither it nor its members are in any true sense trustees. The state legislation respecting this body, as well as the Act of Congress known as The Federal Highway Act, seems to contemplate mutual transactions between the National Government and States. In my opinion the case was one essentially against the State of Wyo-

ming. The case was an action at law to recover a money judgment for increased compensation for construction of the highway, and alleged to have been occasioned by a change of survey. It is conceded in the majority opinion that the State Highway Commission of Wyoming has nothing from which the judgment could be paid, and it is likewise conceded that the plaintiff can recover nothing from the individual members of the Board. It is further conceded that in the event of recovery 'it will be entirely optional with the State as to what, if anything, it will do in the premises.' It seems to me that such an adjudication would be a mere gesture.

"The case of Port of Seattle vs. Oregon & W. R. R., 255 U. S. 56, cited in the majority opinion, seems to me to be clearly distinguishable. In that case the Port of Seattle was expressly created as a Municipal Corporation, and was empowered to hold property and receive revenue in its own legal right. As the Supreme Court there said: 'The Port has thus an independent financial interest in this controversy; and although the State has also an interest, suit against the Port would not be prevented by the Eleventh Amendment.'

"I also think the case of Thomas vs. Board of Trustees, 195 U. S. 207, also cited in the majority opinion, clearly distinguishable. In that case while it was held that the bill did not allege facts showing the incorporation of the Board, the bill did disclose that the Board was in reality a board of trustees, 'and to have the general supervision of all lands, buildings and other property belonging to said college, and of receiving by gift, devise or bequest, moneys, lands and other properties for its benefit and for the benefit of those under its charge, etc.' Had the necessary diversity of citizenship been alleged and the individual members of the Board been named as defendants as in the instant case, the

opinion of the Supreme Court to my mind indicates that the Circuit Court would have had jurisdiction. Indeed, the answers of the Supreme Court were certified with liberty to the Circuit Court of Appeals to authorize an amendment of the bill alleging the necessary diversity of citizenship of the individual members. With the appropriate amendment, I have no doubt that in that case, as well as in the Port of Seattle case, the Court would have had jurisdiction to finally adjudicate the right in question, and grant complete equitable or legal relief in accordance with the class of the respective cases.

"I think the principle laid down in Ex Parte State of New York, No. 1,256 U. S. 490, and Smith vs. Reeves, 178 U. S. 436, is applicable to the case at bar, and that the action here was merely one against the State Highway Commission and its individual members as such. A brief interesting note will be found on the subject in 44 L. R. A. (N. S.) at page 196. I quote from the note: 'In some of the cases the state agency or board is itself a corporation with general power to sue and be sued. In other cases the result in the main seems to depend upon the nature of the action or relief demanded. Thus, in the Lord case, infra, it was a question of obtaining money out of the state treasury; * * *.' 'In Lord & P. Chemical Co. vs. Board of Agriculture, 111 N. C. 135, 15 S. E. 1032, it was held that an action would not lie against the board of agriculture, its commissioner, and the state treasurer to recover taxes paid under protest to it, and turned over it seems to the state treasurer, as the board was a department of the government, and that the action was an action against the state.'

"There is another serious question going to the jurisdiction of a Federal Court. The legislature of the State of Wyoming in amending the original act provided; 'The commission shall have the power to sue in the name of 'The

State Highway Commission of Wyoming' and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it.'

"The case of Smith vs. Reeves, supra, was one brought by an individual against Reeves as State Treasurer of California. Section 3669 of the Political Code of California provided in case of actions against the State Treasurer for the recovery of taxes illegally collected that 'at the time the Treasurer demurs or answers, he may demand that the action be tried in the Superior Court of the county of Sacramento.' It was contended in that case that by the section referred to the State had consented that its Treasurer might be sued in respect to the matters specified. Mr. Justice Harlan, in delivering the opinion of the Court, said:

> 'It is quite true the State has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the State Board of Equalization. But we think that it has not consented to be sued except in one of its own courts. This is not expressly declared in the statute, but such, we think, is its meaning. The requirement that the aggrieved taxpayer shall give notice of his suit to the Comptroller, and the provision that the Treasurer may at the time he demurs or answers 'demand that the action be tried in the Superior Court of the county of Sacramento,' indicate that the State contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals. If a Circuit Court of the United States can take cognizance of an action of this character, the right given to the Treasurer by the local statute to have the case tried in the Superior Court of Sacramento County would be of no value; for, as the jurisdiction and authority of a

Circuit Court of the United States depends upon the Constitution and laws of the United States, it could not refuse to take cognizance of the case if rightfully commenced in it and to proceed to final decree, nor could it, merely in obedience to the laws of the State, transfer it to a state court upon the demand of the State Treasurer. A Federal court can neither take nor surrender jurisdiction except pursuant to the Constitution and laws of the United States.

'In Beers vs. Arkansas, above cited, it was further said: 'As this permission (to be sued) is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted and may withdraw its consent whenever it may suppose that justice to the public requires it. Arkansas, by its constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suits might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would have been made to it. The objection is that it was passed after the suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was

found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power the State violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the State consented to be a party defendant.' "

"Now the question occurs, if a State can resist its suability or the suability of its Treasurer or other officer as such, why may it not likewise restrict the suability of its Commission from whom it has withheld corporate capacity?

"I think the judgment of the District Court should have been affirmed.

"Filed December 21, 1927."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled "Utah Construction Company, a corporation, plaintiff in error, vs. The State Highway Commission of Wyoming, defendant in er-

ror. No. 7793", to the end that the said case may be reviewed and determined by this Court as provided in Section 240 of the Judicial Code as amended by the Act of Congress of February 13th, 1925, providing for certiorari to Circuit Courts of Appeals; and that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court. And your petitioner will ever pray, etc.

STATE HIGHWAY COMMISSION OF WYOMING

By .....

Attorney General of Wyoming.

J. A. Greenwood,
John Dillon
Marion A. Kline
Of Counsel for Petitioner.

We hereby certify that we have examined the foregoing petition and that in our opinion it is well founded and is one in which the prayer of your petitioner should be granted by this Court.

WILLIAM O. WILSON
J. A. GREENWOOD
JOHN DILLON
MARION A. KLINE
Attorneys for Petitioner.

In the Supreme Court of the United States

October Term 1927

No.....

THE STATE HIGHWAY COMMISSION OF WYOMING, CONSISTING OF HYRAM LINGLE, T. D. O'NEIL, S. W. CONWELL, J. M. SNYDER and ROY SENEY,

Petitioner,

vs.

UTAH CONSTRUCTION COMPANY, a Corporation,

Respondent.

Brief in Support of Petition.

The opinion of the District Court in this case will be found at Page 110 of the Record and is reported in 16 Federal Reporter, Second Series, at Page 322. The opinion of the Circuit Court of Appeals, not as yet officially reported, will be found at Page 121 of the Record. (22 Fed Rep (2nd) 638)

Question Involved.

The sole and only question involved in this case is the question of the jurisdiction of the federal courts to hear and determine the controversy. Defendant contends that

this action is in fact an action against the sovereign state of Wyoming, and that therefore the federal courts are without jurisdiction, no federal question being involved. In order to determine this question, it is necessary to call the Court's attention to certain provisions of the Constitution and statutes of Wyoming, relative to highway construction, and then analyze the contract which is the basis of the suit in the light of those constitutional and statutory provisions.

Constitutional Provisions and Statutes of the State of Wyoming involved in this action.

Prior to 1916, the State of Wyoming could not engage in any work of internal improvement unless authorized so to do by a two-thirds vote of the people. In that year a new section was added to Article XVI of the Constitution, which reads as follows:

> "Sec. 9. State highway construction. The provision of Section 6 of Article XVI of this constitution prohibiting the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people shall not apply to or affect the construction or improvement of public roads and highways; but the legislature shall have power to provide for the construction and improvement of public roads and highways in whole or in part by the state, either directly or by extending aid to counties."

In 1919, in order to render effective this amendment to the Constitution, the Legislature of Wyoming passed a State Highway Act. This is now Sections 3025-3037 of the Wyoming Compiled Statutes of 1920; and said law has been in force ever since its passage, except for a certain amendment to Section 3025, passed by the Legislature of 1927.

This Act has been analyzed in the accompanying petition, and the material portions, including the 1927 amendment thereof, are set forth in full in the Appendix to this brief, and are hereby referred to for further particularity.

Even the most cursory reading of these constitutional and statutory provisions conclusively demonstrates that the State Highway Commission is but an arm or agency of the State of Wyoming, created by the state when the people of the state determined to go into the business of constructing state highways; its contracts are the contracts of the state; the moneys paid out by it for the building of those state highways is the money of the State of Wyoming, and not the money or property of any board or individual.

District Judge Kennedy makes the following clear analysis of these constitutional and statutory provisions in his decision:

> "In the light of this authority in analyzing the issue here, we find that the highway construction over which the controversy arises, was initiated by a constitutional amendment which authorized the State of Wyoming to go into the road building business. The state thereupon proceeded to carry out this new function by creating an agency through which it might efficiently act. It provided for raising money by bonding itself and taxing its inhabitants for the purpose, and providing that such money, as well as that received from other sources, should be accumulated in the hands of its State Treasurer; that its chief legal adviser should be the legal adviser of its agency in the premises; that such agency should maintain its office in the State Capitol; that the state might enter into agreements with the United States for the building of roads, under an Act of Congress, which type of road was here under construction; and directed the

manner in which the funds so raised by it should be disbursed, as well as the other incidents which are incorporated heretofore in an analysis of the Wyoming statute." (Record at Page 115)

In connection with the provisions of Section 3034, supra, we also deem it best at this point to call the Court's attention to parts of Sections 118, 131 and 132 of the Wyoming Compiled Statutes of 1920, which have a material bearing upon this case. These are set forth in full in the Appendix. They make it the duty of the State Auditor to audit all claims to be paid out of moneys in the State Treasury and to draw all warrants upon the State Treasurer for money. Section 132 makes it a felony for the State Treasurer to pay out any state funds except on warrants drawn by the State Auditor.

The last section is especially significant. The money in the State Highway Fund is state funds, and that money can only be drawn out of the state treasury on warrants issued by the State Auditor. The defendant Highway Commission has absolutely nothing whatever to do with the payment for work done under contracts for state highway construction. Before any warrants are drawn upon the State Highway Fund by the State Auditor, the vouchers must be approved by the State Highway Superintendent, (Section 3034), but the latter officer is entirely independent of the State Highway Commission. That fact must not be lost sight of. Section 3025 of the Wyoming Statutes provides for the creation of a state highway department to consist of "a state highway commission and a state highway superintendent."

Statement of the Facts.

In 1922, while the above statutory provisions were in force, the Highway Department of the State of Wyoming advertised for bids for the construction of a state highway through the Wind River Canyon. As shown in the accompanying Petition for Writ of Certiorari, this advertisement and the specifications for the work contained many provisions showing that the State of Wyoming was the party in interest which was letting the contract. (Record—Pages 14, 25, 63, 65, 68, etc.)

The Utah Construction Company was the lowest bidder for Sections B, C and D of the road, and thereupon gave a bond conditioned for the faithful performance of the terms and conditions of its contract. This bond was payable to the State of Wyoming, not to the State Highway Department or the State Highway Commission. Thereafter, on June 1st, 1922, a contract was entered into between the Utah Construction Company and the State of Wyoming for the building of these sections of the road. The State Highway Commission acted as the agency of the state in the making of this contract, which is set forth on Pages 68 ffg. of the Record.

That contract provides for the construction of a state highway, the expense of which under the law is to be borne by the State of Wyoming. The State of Wyoming is specifically designated therein as one of the contracting parties, viz, the party of the first part. Most significant of all is the fact that in said contract the construction company agrees to build the road according to certain plans and specifications made a part of the contract, and the State of Wyoming, (not the State Highway Commission or any other agency,) agrees to pay for such work according to the prices

stipulated in the proposals. Here in the contract itself is a definite and fixed statement defining the parties who are obligated under the contract: one, the Utah Construction Company, for the performance of the work, and the other, the State of Wyoming, for the payment for such work.

Later on a supplemental contract was entered into which provided for certain changes in the work to be done, and for an increase in the quantities of tunnel work and unclassified excavation. (Record—Page 72.) This supplemental contract states that it supplements the contract of June 1st, 1922, but it in no manner changes or attempts to change the parties to the original contract or their liability thereunder.

Thereafter, the Utah Construction Company went ahead with the construction work, and in due time completed the work of building said highway. Monthly estimates were made by the State Engineer during the progress of the work, vouchers were submitted by the Construction Company, approved by the State Highway Superintendent, as required by law, and paid by the State of Wyoming out of the State Highway Fund on warrants drawn by the State Auditor. However, after the final completion of the work, a disagreement arose between the parties as to the amount still due to the contractor for work done thereunder.

History of the Case.

The parties being unable to agree as to the amount due the contractor or to settle their differences, on May 13, 1925, the Utah Construction Company filed suit in the United States District Court for the District of Wyoming against the State Highway Commission, to recover the sum of $544,827.74, which said sum was alleged to be due as damages for breach of the contract and for work done and per-

formed under the contract. It is significant that while the State Highway Commission of Wyoming is named as the defendant in that action, yet there is not a single allegation in the petition to show that said commission ever agreed to do a single thing, or that it had ever agreed to pay the construction company anything, or that it had in any way injured, wronged or defrauded the plaintiff. In fact, no liability on the part of said defendant is alleged or shown in the petition, nor does said petition state any cause of action against said Commission. If the petition shows any liability to the plaintiff on the part of any person, or states any cause of action whatever against any one, it shows such liability on the part of the State Engineer, an independent state official, or on the part of the State of Wyoming whom the petition alleges to be the party who had promised to pay for the work done under the contract.

All of these matters are fully set forth in the accompanying petition, and will not be here repeated.

Specifications of Error.

The petitioner relies upon the following specification of error:

The Circuit Court of Appeals erred in holding that the action is not an action against the State of Wyoming, and therefore the federal courts have jurisdiction thereof.

This specification of error will be discussed under the following sub-headings:

1. The findings and decision of the Circuit Court of Appeals that the action is not an action against the State of Wyoming, is erroneous, being in conflict with the previous decisions of this court and with the overwhelming weight of authority;

2. The findings and decision of the Circuit Court of Appeals that an action may be maintained against a state agency on a contract entered into by it on behalf of the State and in which it has no personal interest, is erroneous and in conflict with the decisions of this court;

3. The decision of the Circuit Court of Appeals, holding that this action is not an action against the State of Wyoming, is erroneous in that it decides a question of Wyoming law in conflict with previous decisions of the Wyoming courts;

4. The decision of the Court of Appeals holding that the provisions of Chapter 61 of the Session Laws of Wyoming, 1927, are not controlling in the case at bar, is erroneous and in conflict with the previous decisions of this Court;

5. The decision of the Circuit Court of Appeals is self-contradictory;

6. The decision of the Circuit Court of Appeals would compel the United States District Court for the District of Wyoming and the parties litigant to this action to do a vain and useless act.

I.

The findings and decision of the Circuit Court of Appeals that the action is not an action against the State of Wyoming, is erroneous, being in conflict with the previous decisions of this court and the overwhelming weight of authority.

It is the contention of your petitioner that this action is in effect an action against the State of Wyoming, and therefore within the inhibition of the Eleventh Amendment to the federal constitution.

As has been shown this is an action upon a written contract, the first cause of action being for damages for an al-

leged breach of that contract, and the second cause of action being for the recovery of a certain amount alleged to be due under the terms of that contract on estimates allowed by the State Engineer. It is elementary law that an action on a contract will lie only against those who are parties to that contract, and who are obligated to perform its terms and conditions. In this case, the State of Wyoming is not only named as the contracting party but it is the only party upon whom is imposed the obligation to pay for the work done under that contract. (Record, Page 69, Paragraph II.)

To be sure, the State of Wyoming is not named as a party defendant in this action, and therefore, the lack of jurisdiction of the federal courts does not formally appear on the face of the pleadings. But this Court has long been committed to the doctrine announced in the case of Hopkins v. Clemson Agricultural College, 221 U. S. 363, where it is said:

> "With the exception named in the Constitution, every state has absolute immunity from suit. Without its consent, it can not be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the 11th Amendment has been held to apply, not only where the state is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer, which seeks to compel him to exercise the state's power of taxation, or to pay out its money in his possession on the state's obligations, or to execute a contract, or to do any affirmative act which affects the state's political or property rights." (Authorities).

In support of this proposition, see the following authorities:

Hagood v. Southern, 117 U. S. 52;
Louisiana v. Jumel, 107 U. S. 711;
Ex Parte Ayers, 123 U. S. 443;
Louisiana v. Steel, 134 U. S. 230;
Fitts v. McGhee, 172 U. S. 516;
Murray v. Wilson Distilling Co., 213 U. S. 151;
Pennoyer v. McConnaughy, 140 U. S. 1;
Smith v. Reeves, 178 U. S. 436;
Lankford v. Platte Iron Works Co., 235 U. S. 461;
In Re State of New York, 256, U. S. 490;
Stanley v. Schwalby 162 U. S. 255;
Belknap v. Schild, 161 U. S. 10;
Cunningham v. Railroad Co., 109 U. S. 446;
Hjorth Royalty Co. v. Trustees of University, 30 Wyo. 309;
State v. Field, (N. Mex.) 201 Pac. 1059;
United States v. McCallum, 281 Fed. 834;
McDowell v. Fuller, (Mich.) 135 N. W. 265; 150 N. W. 353.

In the case of Smith v. Reeves, supra, the action was against the Treasurer of the State of California to recover from him the amount of certain taxes which had theretofore been paid to him by the plaintiff. This Court held that the federal courts were without jurisdiction, because the action was against the State of California. Quoting from the opinion:

> "Is this suit to be regarded as one against the State of California, The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief

> sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint."

Petitioner believes the last sentence of the above quotation is a complete answer to that part of the majority opinion of the Circuit Court of Appeals, where it is said:

> "The commission is the sole defendant, it has no property, no power of taxation, no means of discharging a judgment should one be recovered against it. In that event, it will be entirely optional with the state as to what, if anything, it will do in the premises. It will not be legally bound."

The Circuit Court of Appeals thus concedes that if a judgment be recovered in this action, the State of Wyoming is the party which ultimately must pay the judgment, if it be paid at all, and petitioner submits that a judgment against an authorized agency of the state would morally bind the state and "would have the same effect as if it were rendered directly against the state for the amount specified in the complaint."

In the case of Ex Parte Ayers, supra, Ayers, who was Attorney General of the State of Virginia, had been imprisoned for contempt by the United States Circuit Court for disregarding an order of that court enjoining and restraining him from bringing certain suits as commanded by an enactment of the Legislature of Virginia. He brought habeas corpus proceedings in this court, and this court made an order discharging him from custody. Mr. Justice Matthews, in the course of a very exhaustive opinion in

which the former decisions of the court were reviewed, used the following language, which when applied to the facts in the case at bar, would seem to be decisive against the jurisdiction of the federal court:

> "The inference is, that where it is manifest upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the state, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the state, is one of jurisdiction."

and the Court further added that the Eleventh Amendment to the Constitution must be held to cover

> "not only those suits brought against a state by name, but also those against its officers, agents, and representatives, where the state, though not named as such, is nevertheless, the only real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates."

In the decisions of this Court above referred to the actions were brought against natural persons as agents of the State, but the rule of law must be the same where the agency representing the state is a corporation, or a board, or a commission, as in the case at bar. This is clearly shown in the following cases:

State ex rel Gordon v. State Board of Control, (W. Va.) 102 S. E. 688;

Carpenter v. Railway Co., (N. C.) 114 S. E. 693;

Mullen v. Regents of Education (S. D.) 173 N. W. 645.

The Circuit Court of Appeals held that the federal courts have jurisdiction of this case because of diverse citizenship, and cites as its authority for such holding the decision of this Court in the case of Thomas v. Board of Trustees, 195 U. S. 207, 218. (Record—Page 131.) That case, however, is clearly distinguished in the dissenting opinion of Judge Scott, (Record, Page 132). It can also be further distinguished from the case at bar in this: The Board of Trustees of Ohio State University was not only empowered "to have the general supervision of all lands, buildings and other property belonging to said college, and of receiving by gift, devise or bequest moneys, lands and other properties for its benefit", but in addition thereto, in that case, the facts were that certain lands were in the possession of this Board, and the Board as a Board claimed ownership thereof. The plaintiff brought an action for the partition of those lands and sought to have the title adjudicated as preliminary to the partition. The trial court found that the land belonged to the Board of Trustees of the Ohio State University. In that case, also, the question of the suit being a suit against the State of Ohio was not raised in any manner, nor was the Eleventh Amendment in any way referred to. The action had reference solely to lands the alleged title to which was in the Board of Trustees. The Board alone was the party in interest. Petitioner respectfully submits that the Thomas case is not an authority in point in this case, because of the difference in the facts of the two cases, but that this case is controlled rather by the decision of this Court in Murray v. Distilling Co., 213 U. S. 151.

In the latter case, two cases were consolidated for hearing, the other being Murray v. The Fleischmann Company. The bill of complaint in The Fleischmann Company case is set

forth in full in the opinion of the Circuit Court of Appeals, 164 Fed. 1. It there appears that the case was entitled,

> "The Fleischmann Company, Complainant, v. W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Constituting the State Dispensary Commission of the State of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Individually, Defendants."

The bill of complaint rested the jurisdiction of the federal courts upon an alleged diversity of citizenship of the parties, and it contained the allegations that each of the individual defendants was a citizen and resident of the State of South Carolina, and that the complainant was a resident and citizen of the State of Ohio, thus complying with the rule as announced by this Court in the Thomas case so that the jurisdiction of the Circuit Court "sufficiently appeared as far as the pleadings were concerned."

Such being the facts as shown by the pleadings, what did the courts do? The trial court found for the plaintiffs, and the Circuit Court of Appeals affirmed its decree, but when the case reached this Court, it looked through form to substance and saw that the State was the real party defendant, instead of its agent, the State Dispensary Commission, the nominal defendant, and held that the federal courts were without jurisdiction, because the suits were in effect suits against the sovereign state of South Carolina and thus were within the inhibition of the Eleventh Amendment to the Federal Constitution.

The following quotation from the opinion of the Court in the Murray case is very significant and persuasive when applied to the facts as they appear in the case at bar:

> "We could not, therefore, sustain the exercise of jurisdiction by the circuit court without in effect de-

> ciding that the state can be compelled, by compulsory judicial process, to perform a contract obligation. It is certain that, at least by indirection, the bills of complaint sought to compel the state to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied."

What is the case at bar but an attempt to compel the State of Wyoming to perform an alleged contract and to pay the Utah Construction Company for work and labor alleged to have been done and performed under that contract? It is admitted that the defendant Commission has no funds, no power of taxation and no means of paying any judgment.

Petitioner respectfully submits that the Murray case is practically on all fours with the case at bar, and that the decision in that case should control the decision in the instant case; also, that the decision of the Circuit Court of Appeals is in direct conflict with the foregoing decisions of this Honorable Court, is in contravention of the Eleventh Amendment to the Federal Constitution, and therefore should be reversed and set aside.

II.

The findings and decision of the Circuit Court of Appeals that an action may be maintained against a state agency on a contract entered into by it on behalf of the state and in which it has no personal interest, is erroneous and in conflict with the decisions of this court.

The Circuit Court of Appeals holds in effect that although the contract here in question was entered into by a state agency for the construction of a state highway, to be paid for by the State of Wyoming, yet, after all, since the agency was in the nature of a Board or Commission, and not a natural person, such Commission could be held liable on the contract. It is conceded in its opinion that the members of

the commission would not be personally liable, had they been made parties, because their acts were official and not of a personal character. (Record, Page 131).

With all due deference to the Court of Appeals, it is respectfully submitted that the Court either misunderstood or misapplied the authorities cited in its opinion in support of the above statement. The members of the Commission did not act as individuals, either officially or otherwise, in regard to the contract sued on. It was the Highway Commission that acted in the execution of this contract and its acts were official and not of a personal character. As said by Chief Justice Marshall in the case of Hodgson v. Dexter, 1 Cranch, 345:

> "It is too clear to be controverted that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government are public and not personal. They enure to the benefit of, and are obligatory on, the Government; not the officer." See also Belknap v. Schild, 161 U. S. 10.

Now, it is too clear to admit of argument, that under this rule of law, if the Governor or State Treasurer of the State of Wyoming had been authorized by law to execute contracts for the construction of State Highways, the costs of which were to be paid by the State of Wyoming, and they had executed such contract in behalf of the State, the Governor or such other officer could not be held personally liable on such contract, nor could any suit be maintained against such officer on said contract. But if this be true of a natural person as agent, it must also be true of every other agent, whether that agent be a corporation, a Board or a Commission authorized to act for and in behalf of the State.

The case of Astoria Marine Iron Works v. United States Shipping Board Emergency Fleet Corporation, 295 Fed.

415, 417, cited in the opinion of the Circuit Court of Appeals is practically on all fours with the case at bar and is an authority against rather than in favor of its decision. In that case, action was brought by the plaintiff against the defendant corporation to recover $188,000.00, alleged to be due on a contract between plaintiff and defendant. The contract recited that it was made between the Astoria Marine Iron Works, party of the first part, and the United States Shipping Board Emergency Fleet Corporation, representing the United States of America (hereinafter called the owner) party of the second part. The hulls referred to in the contract and which were to be built by the plaintiff did not belong to the defendant corporation, but were the property of the United States, and the money to be used in payment on the contract was the money of the United States regularly appropriated by act of Congress, etc.

Under this state of facts, the Court overruled the demurrer to the answer and held that:

> "The defendant is not in my judgment liable personally on the contract so made any more than the President would have been if he had made it himself. It is an established rule of law that where a public officer or agent acts in the line of his duty and by legal authority, he is not responsible on any contract he makes in that capacity, and when his contract or engagement is concerned with a subject fairly within the scope of his authority, it shall be considered to have been made by him officially and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable, although such contract may be under his hand and seal."

It will be noticed that in the above case it was disclosed on the face of the contract, that the Emergency Fleet Corporation, although it was the person executing the contract, entered into that contract in behalf of the United States of America. In the case at bar, also, the contract on its face discloses that the State Highway Commission of Wyoming, the person executing the contract, was acting for and in behalf of the State of Wyoming, the real party to the contract. If the reasoning of Judge Bean in the above case is correct, and the decisions of this court cited by him uphold him in his position, then, in the present case, the defendant Commission cannot be held personally liable on this contract.

The fallacy of the reasoning of the Circuit Court of Appeals may be shown as follows: Suppose that instead of designating the State Highway Commission and giving it power to enter into contracts for the construction of State Highways, the legislature had seen fit to designate an individual, as for instance, the Secretary of State, to exercise the powers conferred by the State Highway Act upon the State Highway Commission. According to the opinion of the Court of Appeals, an action would lie against the Secretary of State on such contract and yet according to the same opinion he would not be personally liable thereon.

Petitioner respectfully submits that in the present case it acted in the line of its duty, under authority of law; that its contract was made on account of the State of Wyoming and enured to the benefit of the State; that petitioner has no personal interest in said contract and is not liable thereon.

III.

The decision of the Circuit Court of Appeals holding that this action is not an action against the State of Wyoming is erroneous in that it decides a question of Wyoming law in conflict with previous decisions of the Wyoming courts.

The Wyoming Supreme Court and the inferior courts of the State have uniformly held that suits of this character are suits against the State itself. On this proposition see

Hjorth Royalty Co. vs. Trustees of University, 30 Wyo. 309;

Franzen vs. Southern Surety Co., 35 Wyo. 15.

In the Hjorth Royalty Company case suit was brought against the Board of Trustees of the University of Wyoming to quiet title to a certain piece of land, which had been granted to the State of Wyoming by the federal government for the benefit of the University. The Supreme Court held that the suit was a suit against the State of Wyoming and laid down the following rule of law:

> "A suit against a department of the state government or a board or corporation created by the state for governmental purposes, is a suit against the state."

In the case of Franzen v. Southern Surety Co., supra, the facts were that on June 1st, 1922, the State Highway Commission of Wyoming had entered into a contract with the firm of Fitzgerald Bros. for the building of a portion of a state highway located in Albany County. In compliance with the provisions of Section 329 of the Wyoming statutes, the contractors gave a bond with the Southern Surety Company as surety, conditioned for the faithful performance of the contract and "to pay all just claims for all work or labor performed and material furnished in the execution of the contract." Thereafter, Franzen who had furnished materials to the contractors for which he had not been paid, brought an action on the bond.

It will be noted that in the above case, as in the case at bar, there was a contract for the building of a state highway, and no doubt it was executed on the same printed form that

was used in the present case, as the contract here sued on was executed on June 3, 1922, just two days later than the contract in the Franzen case.

In its decision the Wyoming Supreme Court makes the following statement which shows clearly the position of the Wyoming courts:

> "Section 329 supra, deals with bonds in connection with contracts made by public officials under the control of the state. The contract in this case was let by one of the departments of the state itself. We are unable to see why the state may not let its own contracts upon any conditions, of benefit to the public, which it deems fit to impose, or why the Legislature should not have the power to require the agents of the state to let such contracts only upon such conditions. No authority to the contrary has been called to our attention."

Thus it will be seen that the Wyoming Supreme Court unequivocally holds that the State Highway Commission is "one of the departments of the state itself." If one of the departments of the state, then its contracts are the contracts of the State of Wyoming, and the next statement in the Court's opinion would naturally follow, "that the State may let its own contracts upon any conditions it sees fit to impose."

Here is the construction of a Wyoming statute by the Wyoming Supreme Court, and in accordance with well established rules of procedure the federal courts should follow such construction, and should hold that your petitioner is a department and agency of the state and that the contract sued on in this case is the contract of the State itself. See

Barnum v. Okolona, 148 U. S. 393;
Bacon v. Insurance Co., 131 U. S. 258;
Townsend v. Todd, 91 U. S. 452.

As the matter now stands, we have on the one hand the Wyoming Supreme Court announcing the doctrine that under the Wyoming statutes creating the State Highway Commission, the Commission is a department of the State of Wyoming itself, and that contracts entered into by said Commission for the construction of state highways are the contracts of the State of Wyoming, and that a suit against a department of the state created by the State for governmental purposes is a suit against the State itself; and, on the other hand, the Circuit Court of Appeals of the Eighth Circuit speaking through Judge Lewis, holding that the State Highway Commission is a legal entity separate and apart from the state, and that the contracts entered into by it in behalf of the State of Wyoming are its own contracts and not the contracts of the State, and that a suit against such Commission is not a suit against the State. Petitioner respectfully submits that the construction adopted by the Wyoming Supreme Court is the only construction in consonance with all the facts in this case. Further, these holdings of the Wyoming court in the construction of the Wyoming statutes have always been followed by the federal courts in Wyoming. See Fidelity and Deposit Company of Maryland v. Trustees of the University of Wyoming, et al., 16 Fed. (2nd Ser.) 150.

IV.

The decision of the Circuit Court of Appeals holding that the provisions of Chapter 61 of the Session Laws of Wyoming, 1927, are not controlling in the case at bar, is erroneous and in conflict with the previous decisions of this Court.

As heretofore stated, the Wyoming State Legislature in 1927 passed an Act amending Section 3025 of the Wyoming Compiled Statutes of 1920, so as to provide that the State

Highway Commission may be sued in the Wyoming courts "and in no other jurisdiction upon any contract executed by it."

It was admitted by respondent in the District court and also in its brief filed in the Circuit Court of Appeals that the State Highway Commission is merely a state agency existing for governmental purposes, and that as such agency, it could not be sued except as provided in the statute creating it. But if the State Highway Commission is so far an arm or agency of the State of Wyoming that the legislature of that state can prescribe the courts where and the terms and conditions under which it may be sued, then it is so far an arm or agency of the state that the state may withdraw at any time the consent given, or hedge it about with new terms and conditions. There can be no other conclusion from the authorities. Hence the Legislature of 1927 had the right to prescribe in what courts the Commission might be sued.

As has been shown, the State of Wyoming created the State Highway Commission as an arm or agency of the state itself. It is not a body corporate, nor has it any status in any court except such as has been given it by the statute creating it. It is neither a natural nor an artificial person. It is not even a legal entity, except in so far as it is made such by statute. Certainly when the Wyoming State Legislature of 1927 provided that said Commission could be sued only in the state courts and in the courts of no other jurisdiction, it violated no contractual rights of the plaintiff.

It is elementary that a law providing that the State may be sued in certain cases or in certain courts is not a contract, and that such a law may be modified or repealed even while an action which has been brought under such law is pending.

See

Beers v. Arkansas, 20 How. 527;
In re Ayers, 123 U. S. 443;
Hans v. Louisiana, 134 U. S. 1;
Ex Parte State, 52 Ala. 235;
Railroad Co. v. Tennessee, 101 U. S. 337;
Railroad Co. v. Alabama, 101 U. S. 832;
Baltzer v. North Carolina, 161 U. S. 240;
Vance v. Ranking, (Ill.) 62 N. E. 807;
South Carolina v. Gaillard, 101 U. S. 433;
Holcomb v. Boynton, (Ill.) 37 N. W. 1032;
In re McCardle, 7 Wall. 514;
McDowell v. Fuller, (Mich.) 135 N. W. 265; 150 N. W. 353;
Oliver American Trust Co. v. Government of the U. S. of Mexico, 5 Fed. (2nd Ser.) 659;
In re Hoople, 179 N. Y. 308, 72 N. E. 229;
Ball v. Halsell, 161 U. S. 72.

On this proposition, the pronouncement of this court in the cases of Beers v. Arkansas, and Railroad Co. v. Tennessee are especially persuasive, though in those cases the states themselves were named in the record as defendants.

The case of McDowell v. Fuller, supra, is practically on all fours with the case at bar. In that case an action was begun by McDowell as assignee of the firm of Edward Wallenstein Co. against Otis Fuller, as warden of the Michigan State Reformatory, to recover damages for an alleged breach of a contract entered into between its assignor and Fuller for the manufacture of shirts and the employment of prison labor in such manufacture. The case was tried to a jury and there was a judgment for the plaintiff in the sum of $22,000.00. The defendant took a writ of error to the Supreme Court.

In the meantime, after the rendition of the judgment and before the case was heard in the Supreme Court, the legislature amended the act under which the suit had been brought. The law as it stood at the time the suit was brought and trial had, contained a provision that all the fiscal transactions and dealings "on account of each prison shall be conducted in the name of the warden thereof, who shall be capable in law of suing and being sued in all matters concerning said prison, by his name and office."

The amendment provided that the warden might sue in his own name upon prison contracts, but omitted the provision that he might be sued.

The case was heard twice in the Supreme Court, once on a motion to dismiss the appeal and action, 135 N. W. 265, and afterward on its merits, 150 N. W. 353, when the Court reversed the judgment of the trial court and refused to grant any new trial, thus ending the litigation. In its opinion reported in 135 N. W. 265, the Court used the following language, every word of which is applicable to the peculiar facts in the case at bar:

> "In so far as appears from what is presented in this motion, defendant Fuller is sued and declared against as "warden of the Michigan Reformatory", not as a private individual but as a state official, touching a contract made by him in his capacity of such Warden and while acting as agent of the state, under statutory authority, in charge of one of its penal institutions. * * * Defendant is sued "by his name of office" under authority of the same act which empowered him to make the contract for the state. He is not claimed to have acted, and is not sued, as a private individual. His participation in terminating the contract in question was in an official capacity, as warden, by authority of the board of control

of said institution, a legally constituted agency of the state, under whose direction he conducted the affairs of the institution.

"While the contract purports to be the contract of the warden, and he is the nominal party defendant it was in truth a contract with and for the state, negotiated by and through him as its agent, thus making this action intrinsically against the state of Michigan. • • •

"The state is sued in the name of its officer and agent by his "name of office" under express permission and authority granted by said Section 2091, without which the suit could not have been so instituted. Act. 219, S. L. 1911, amending said section took away both the independent right of the warden to sue others and all right of others to sue him, and to that extent repealed in terms said section.

"The state is at liberty to determine for itself whether it may be sued and in what manner. Laws governing such consent may be repealed at any time, and, as a general rule, upon repeal of a statute authorizing suit against a state not only can not suits thereafter be brought, but the court in which suit against a state is pending can proceed no further. This principle has been more than once recognized and announced in decisions of this court."

Petitioner respectfully submits that under the above authorities, when the legislature of 1927 passed the above amendment, limiting suits against the State Highway Commission to the courts of the State of Wyoming, that amendment, ipso facto, deprived the federal courts of any further jurisdiction in the case at bar.

V.

The decision of the Circuit Court of Appeals is self-contradictory.

This matter has been called to the attention of the Court in the petition for certiorari, where the majority and minority opinions are set forth in full. With all due deference to the Circuit Court of Appeals, the petitioner respectfully submits that said opinion is inconsistent with itself.

The majority opinion first lays down the rule that "those only can sue or be sued upon an indenture who are named or described in it as parties", and it then says, "Primarily the commission could not be sued at law unless it be a party to the contract". With this statement of the law petitioner agrees, but it does not agree with the application of that statement as made by the Circuit Court of Appeals to the facts in the case at bar. As we have seen, the first paragraph of the contract is in these words:

> "This agreement made and entered into this 1st day of June, 1922, between the State of Wyoming, acting through the State Highway Commission, and Utah Construction Company, a corporation, of Ogden, in the State of Utah, hereinafter called the contractor". (Record—Page 68).

From this paragraph it distinctly appears that the parties to the contract are the State of Wyoming and the Utah Construction Company, and that the State Highway Commission is the state agency which represents the State in the transaction. Nothing could be clearer than this, if this paragraph has any force or meaning at all.

Then paragraph II of the contract also is very specific as to the parties. It reads as follows:

> "In consideration of the covenants and agreements to be kept and performed by the Contractor, and for

> the faithful performance of this contract and the completion of the work embraced therein according to the plans, specifications and conditions herein contained and referred to, the State of Wyoming shall pay and the Contractor shall receive and accept as full compensation for everything furnished and done by the Contractor under this contract and also for all loss or damage arising out of the nature of the contract, the action of the elements or from any unforseen contingencies or difficulties encountered in the prosecution of the work, the prices stipulated in the proposal." (Record—Page 69.)

Then take the testimonium clause, which reads as follows:

> "In witness whereof, the State of Wyoming, acting through its State Highway Commission, party of the first part, has caused these presents to be executed by its Superintendent and the seal thereof to be hereunto affixed, on the day and year first above written; and the said party of the second part has caused these presents to be executed and has hereto affixed his hand and seal the 3rd day of June, A. D. 1922". (Record—Page 71).

Can there be any question from these paragraphs but that the State of Wyoming is the person named therein as a party to the contract, and that under the statement of the law by the Court of Appeals, it is the only party who may be sued thereon? Can the force of such statements in the contract be entirely abrogated by a statement in the supplemental agreement that the contract was entered into "between the State Highway Commission of Wyoming and the Utah Construction Company"? A supplemental agreement by its very nature does not in any way destroy or abrogate

the original agreement but merely supplements the same,—adds something thereto. The two must be read together so as to get the entire agreement, and if there is anything that appears contradictory therein, that construction must be given which will harmonize them and give effect to every phrase and clause. But the Circuit Court of Appeals in the majority opinion ignored the above provisions of the original contract and bases its decision upon one clause of the supplemental contract, a clause that can readily be harmonized with all the other recitals of both contracts.

The original contract recites that the State of Wyoming was acting through the State Highway Commission, the contract was signed by the State Highway Commission and its seal attached, and such being the facts there is no question but that the contract was entered into between the "State Highway Commission of Wyoming and the Utah Construction Company", as recited in the first paragraph of the supplemental agreement, but it was entered into by the State Highway Commission as agent acting for and in behalf of the State of Wyoming.

Then the majority opinion says: (Record—Page 130)

> "The statute made it (i. e. State Highway Commission) a legal entity for that purpose, imposed on it the duty of initiating the improvement, to supervise its construction and to make settlements with the contractor."

Yet in the very same opinion where the statute itself is quoted, it says that Section 3026 provides that the "State Highway Superintendent shall have complete charge of laying out and establishing highways upon which any portion of the State Highway Fund is to be expended", (Record—Page 122); that Section 3027 provides that the State Highway Superintendent "shall have complete charge" of

all contracts for state highway construction; (Record—Page 123), and Section 3034 provides for all payments to be made by warrants upon the State Treasurer, and no warrant shall be drawn on the State Highway Fund except on voucher approved by the State Highway Superintendent. (Record—Page 124). But the State Highway Superintendent and the State Highway Commission are separate and distinct divisions of the State Highway Department. (See Sec. 3025). (Record—Page 122).

Again the Court of Appeals in the majority opinion says: "We are not impressed with the soundness of the contention that the suit is in reality one against the State", and yet in the very same paragraph, it concedes that should a judgment be recovered against the defendant commission, if that judgment is paid at all, it will have to be paid by the State of Wyoming. Petitioner respectfully submits that if the State of Wyoming is the only party to whom the judgment creditor can look for payment, then it is the real party in interest.

Again, the Court of Appeals in the majority opinion says:

> "It hardly need be said that the members of the Commission would not be personally liable had they been made parties; because their acts were official and not of a personal character". (Record—Page 131.)

But the individual members of the Commission were not acting in an official or any other capacity in the making of this contract. They were acting simply as members of the State Highway Commission, and that commission, and not the individual members composing it, acted in an official and not in a personal capacity, in entering into the contract in controversy here. Petitioner submits that the case of

Belknap v. Schild, 161 U. S. 10, Hodgson v. Dexter, 1 Cranch 345, and other cases cited in the majority opinion, instead of supporting the conclusions stated in said opinion, are in direct conflict therewith.

How much clearer and more self-consistent are the dissenting opinion of Judge Scott and the opinion of the trial court, as reported on Pages 110 and 132 of the Record.

VI.

The decision of the Circuit Court of Appeals would compel the United States District Court for the District of Wyoming to do a vain and useless act.

The Circuit Court of Appeals in its opinion admits that the defendant commission has no property, no power of taxation, no means of discharging a judgment should one be recovered against it. This being true and there being no party who could be made to respond to a judgment, or any party legally liable thereon, what is the use of taking up several weeks of the time of the United States District Court, as well as the time of attorneys and witnesses to accomplish what Judge Scott has aptly declared " a mere gesture". Two of the oldest and best established legal maxims are lex nil facit frustra, and lex neminen cogit ad vana seu inutilia. Surely nothing could be more useless than a paper judgment against a nominal defendant without money or property, or any means of ever satisfying such judgment.

Conclusion.

The decision of the Circuit Court of Appeals, in the case at bar, if unchallenged and unreversed, becomes the law of the case, and thereby compels the State of Wyoming, in an action brought against it by a citizen and resident of the State of Utah, to submit itself to the jurisdiction of the fed-

eral courts, in contravention of the provisions of the federal constitution and statutes and in violation of the policy of said state as expressed in its own statutes and in the decisions of its Supreme Court. We submit that the petition for writ of certiorari should be granted and the cause reviewed by this Honorable Court.

Respectfully submitted,

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Appendix

The following are those portions of the Wyoming Compiled Statutes of 1920 which have a material bearing upon the questions under discussion:

"Section 3025. There is hereby created a state highway department to consist of a state highway commission and a state highway superintendent. The said commission shall consist of five state highway commissioners, who shall biennially elect their chairman. The said commissioners shall be appointed by the governor by and with the advice and consent of the senate and each shall serve for the term of six years. * * * The commission shall maintain offices in the state capitol which shall be in charge of the state highway superintendent. The commission shall have the power to sue in the name of the 'State Highway Commission of Wyoming,' and may be sued by such name in any Court upon any contract executed by it. The attorney general shall be the legal advisor of the commission and shall prosecute and defend all actions and appear in all proceedings in any federal department in which the commission shall be a party or be interested. The commission shall have a seal bearing the words 'State Highway Commission of Wyoming, Official Seal.".

"Section 3026. The Commission shall appoint a State Highway Superintendent, with a salary to be fixed by the Commission, payable in equal monthly installments. He shall be experienced and skilled in highway and bridge construction and maintenance; shall be allowed his actual and necessary traveling and other expenses incurred in the discharge of his official duties, and shall give his entire time to the duties of his office. Before entering upon the duties

of his office he shall take the constitutional oath of office and give bond to the State of Wyoming in such amount and with such surety as may be approved by the Commission, conditioned upon the faithful discharge of his duties and his accounting for all property, material and records in his control. Under the supervision of the Commissioner he shall have complete charge of laying out and establishing highways upon which any portion of the State Highway Fund is to be expended, except on those highways constructed, improved or maintained in co-operation with the Secretary of Agriculture of the United States under Section eight of the Act of Congress or other Federal Act or Acts specifically authorizing the use of Federal Funds to build roads within or partially within the national forests, and with the approval of the Commission shall purchase all materials, supplies and equipment, including road building machinery, materials, supplies and equipment, and shall employ such engineers, superintendents and employees with salaries to be approved by the Commission, as may be necessary for the proper performance of the duties of the Commission and the construction work undertaken by it."

"Section 3027. All road and bridge construction work any part of the cost of which is paid from the state highway fund shall be performed in accordance with the plans and specifications prepared by the state highway superintendent and approved by the commission, and shall be performed by or under contracts awarded by the commission, and the state highway superintendent shall have complete charge thereof, except on those highways constructed, improved or maintained in co-operation with the secretary of agriculture of the United States under section eight of the act of congress or other federal act or acts specifically authorizing the use of federal funds to build roads within or partially within the national forests."

"Section 3028. It shall be the duty of the state highway commission from time to time to designate public highways to be known as state highways, which may coincide in whole or in part with county roads theretofore legally established, and whenever such state highway shall be defined and designated by resolution duly entered in the minute record of the said commission, the title and interest of the respective counties, in so much of the road and right of way as shall be so designated shall pass to and vest in the state of Wyoming."

"Section 3029. Excepting as such work may be performed in cooperation with the secretary of agriculture of the United States as hereinafter provided, the construction and maintenance of all state highways, including all bridges, and culverts thereon, shall be performed at the expense of the state and by and under the supervision of the commission and the state highway superintendent."

"Section 3031. The legislature of the state of Wyoming, hereby assents to the provisions of the act of Congress approved July 11th, 1916, entitled 'An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' together with all acts and legislation amendatory thereto or supplementary thereto or which shall grant or authorize aid for the construction, improvement, maintenance or repair of public roads or highways. The state highway commission is hereby authorized to enter into all contracts and agreements with the United States government relating to the construction and maintenance of roads under the provisions of the said act or acts of congress to submit such scheme or program of construction or maintenance as may be required by the secretary of agriculture and to do all other things necessary fully to carry out the cooperation contem-

plated and provided for by the said act or acts, for the construction or improvement of highways under the said act, the good faith of the state is hereby pledged to make available funds sufficient to equal the sums apportioned by the state by or under the United States Government during each of the years for which federal funds are appropriated by section 3 of said act, and to maintain the roads so constructed with the aid of funds appropriated and to make adequate provisions for carrying out such maintenance. * * * If the road to be improved under such cooperative agreement is a state highway, the state's share of the expense shall be borne entirely by the state."

"Section 3034. There is hereby created a fund to be known as the state highway fund, to the credit of which the state treasurer, who is hereby designated as the state official to receive all amounts paid by the United States under the said act of Congress approved July 11, 1916, shall place all moneys heretofore received for said fund, all money hereafter received from the United States, under cooperative agreements as hereinbefore authorized, all money derived from taxes levied for such purpose or appropriated for said fund, all moneys received from the sale of state bonds for highway construction or improvement, all money received from the counties under cooperative agreements as hereinbefore authorized, and all other moneys received from donations or bequests which may be accepted by the commission on behalf of the state of Wyoming, or from any other source designated by law for that purpose. All moneys in said fund shall be available for the purposes of this chapter without further appropriation and no warrant shall be drawn thereon excepting on voucher approved by the state highway superintendent."

"Section 3035. Appropriation. There is hereby appropriated to the state highway fund in the state treasury not otherwise appropriated, the sum of three hundred thousand dollars which shall be made available upon the passage of this chapter, and the additional sum of three hundred thousand dollars which shall be available on March first, 1920."

"Section 3020. For the purpose of providing funds for the construction and improvement of public roads and highways in Wyoming, the state treasurer, with the approval of the governor is hereby authorized from time to time within the limits of the amount authorized by law to issue and dispose of bonds of the State of Wyoming to be designated as highway bonds."

"Section 3021. Such bonds shall bear date and may be issued in such amounts and bearing such rates of interest * * * as shall be determined by the governor and state treasurer. * * * They shall be signed by the governor and attested by the secretary of state under the seal of the state and countersigned by the state treasurer."

In 1927, Section 3025 of the Wyoming Compiled Statutes, 1920, supra, was amended and re-enacted so as to read as follows: (Ch. 61, Sec. 1.)

"Section 3025. There is hereby created a state highway department to consist of a state highway commission and a state highway superintendent. The said commission shall consist of five state highway commissioners, who shall biennially elect their chairman. The said commissioners shall be appointed by the governor by and with the advice and consent of the senate and each shall serve for the term of six years; provided, that upon the passage of this chapter, the governor shall appoint two commissioners for the term of two years, two commissioners for the term of four years,

and one commissioner for the term of six years. One commissioner shall be appointed from each of the following described districts: District No. 1, composed of the counties of Laramie, Albany, Platte and Goshen; District No. 2, composed of the counties of Carbon, Sweetwater, Uinta, Lincoln, Sublette and Teton; District No. 3, composed of the counties of Niobrara, Converse, Natrona and Fremont; District No. 4, composed of the counties of Hot Springs, Washakie, Big Horn and Park; District No. 5, composed of the counties of Sheridan, Johnson, Campbell, Crook and Weston. If any commissioner shall cease to be a resident of the district from which he is appointed, his office shall be vacant; all vacancies from any cause shall be filled by appointment by the governor for the unexpired term. Each of said commissioners shall qualify by taking the constitutional oath of office and each shall receive a salary of six hundred dollars per year and his actual and necessary traveling expenses while away from his home in the performance of the duties of his office, to be paid from the state highway fund hereinafter provided. The commission shall maintain offices in the state capitol which shall be in charge of the state highway superintendent. The commission shall have the power to sue in the name of the "State Highway Commission of Wyoming", and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it. The attorney general shall be the legal advisor of the commission and shall prosecute and defend all action—and shall also appear in all proceedings in any federal department in which the commission shall be a party or be interested. The commission shall have a seal bearing the words "State Highway Commission of Wyoming, Official Seal," and all copies of all records and other instruments in the office of the commission, certified under the hand of its secretary with said seal affixed shall be re-

ceived in any court as prima facie evidence of the original record or instrument."

The following sections of the Wyoming Compiled Statutes of 1920, defining the duties of the State Auditor and the State Treasurer, have also an important bearing on the questions before the court, when taken in connection with the statutes relative to the State Highway Fund:

"Section 118. The State Auditor shall:

First—Audit and settle all claims against the state payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers and persons.

Second—Draw all warrants upon the treasurer for money.

Third—Express in the body of any warrant which he may draw upon the treasurer, for money, the particular fund appropriated by law out of which the same is to be paid.

Fourth—Audit, settle and adjust the accounts of the collectors of the revenue, and other holders of public money, who are required by law to pay the same into the treasury.

Fifth—Keep an account between the state and the state treasury.

Sixth—Keep an account of all debts and credits between the state and the United States, and between the state and every other state, sovereignty, community, officer or person, with whom the state may have dealings, and of any separate fund in the state authorized by law.

Seventh—Direct prosecution in the name of the state for all official delinquencies in relation to the assessment, collection and payment of the revenue, against all persons who may, by any means, become possessed of public money or property and fail to pay over or deliver the same, and against all debtors of the state.

Eighth—Give information in writing to either house of the legislature, whenever required, upon any subject relating to the fiscal affairs of the state, or touching any duty of his office.

Ninth—Perform all such other duties as may be required of him by law."

"Section 131. The State Treasurer shall:

First—Receive and keep all moneys of the state, not expressly required by law to be received and kept by some other person.

Second—Pay all warrants duly and legally issued by the auditor so long as there are in his hands funds sufficient to pay such warrants; Provided, That his payment for any purpose shall in no case exceed the amount appropriated for such purpose.

Third—Keep a just, true and comprehensive account of all money received and disbursed.

Fourth—Keep a just and true account of each head of appropriation made by law, and the disbursements made under the same.

Fifth—Render his account to the auditor for settlement quarterly, or oftener if required.

Sixth—Give information in writing to either house of the legislature whenever required, upon any subject connected with the treasury, or touching any duties of his office.

Seventh—Perform all such other duties as may be required of him by law."

"Section 132. The treasurer shall in no case disburse or pay out the state funds except on warrants drawn by the auditor. Any violation of the provision of this section shall be deemed a felony and upon conviction thereof, the perpetrator shall be punished by a fine of not more than three thousand dollars and by imprisonment for not more than five years in the penitentiary."